Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Interpretation of the Telephone Consumer	)	CG Docket No. 18-152
Protection Act	)	CG Docket No. 02-278
	)	

To: Consumer and Governmental Affairs Bureau

REPLY COMMENTS OF TECHFREEDOM

The initial comments filed pursuant to the Commission's Public Notice of May 14, 2018 overwhelmingly support adoption of an interpretation of the automatic telephone dialing system (ATDS) definition that conforms to the statutory language and Congress's intent.[1] The comments generally confirm the view, expressed in TechFreedom's initial comments, that predictive dialers and other advanced call completion technologies improve consumer communications and protect public safety by avoiding the random or sequential number generation approach that Congress expressly chose to restrict; and that confining the ATDS definition to its intended scope will encourage beneficial innovation and serve the public interest. The record in this proceeding gives

[1] *Public Notice,* DA 18-493, released May 14, 2018. Comments that favor reform of the Commission's ATDS interpretation include Comments of ACT|The App Association in CG Dockets Nos. 18-152 and 02-278 (filed Jun. 15, 2018); Comments of the American Financial Services Association; Comments of Heartland Credit Union Association; Comments of Quicken Loans Inc.; Consumer of Mortgage Loan Coalition, Housing Policy Council; Comments of the Retail Industry Leaders Association; Comments of the Student Loan Servicing Alliance *et al.*; Comments of the Coalition of Higher Education Assistance Organizations; Comments of Edison Electric Institute *et al.*; Comments of the Retail Energy Supply Association; Comments of Tatango, Inc.; Comments of the National Council of Higher Education Resources; Comments of Cisco Systems, Inc.; Comments of the International Pharmaceutical & Medical Device Privacy Consortium; Comments of Consumer Bankers Association; Comments of Credit Union National Association; Comments of Professional Association for Customer Engagement; Comments of National Association of Federally-Insured Credit Unions; Comments of Independent Community Bankers of America; Comments of the American Association of Administrative Healthcare Management.

the Commission ample grounds to reform its past, harmful interpretation of the TCPA definition in accordance with the mandate of the D.C. Circuit in *ACA International v. FCC.*[2]

The few comments filed in support of the dysfunctional *status quo* do not support a different result. Instead, those filings ask the Commission to disregard the statutory language in order to encourage ongoing class-action suits and punish lawful communications of which those commenters disapprove.[3] As further discussed below, these arguments are entirely without merit.

1. An Unlawfully Expansive ATDS Definition is not Required to Prevent Abuse of Consumers.

The National Consumer Law Center (NCLC) and some other commenters describe various categories of calls that, in their view, are especially annoying and harmful to consumers. Those include: (1) calls that promote fraud or identity theft; (2) debt collection calls placed by creditors rather than collection agencies; and (3) telemarketing calls.[4] According to these commenters, the public cannot be adequately protected from such calls unless the Commission arbitrarily continues to discourage the use of dialing technologies that fall outside the ATDS definition. In fact, deliberate misreading of the ATDS definition will violate the statute without materially advancing the interests of consumers.

Notably, calls that promote fraudulent schemes or identity theft already are unlawful under the Federal Trade Commission (FTC) Act, the FTC's Telemarketing Sales Rule and the

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[2] *ACA Int'l, et al. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (mandate issued May 8, 2018) (affirming in part and vacating in part *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) (*2015 TCPA Declaratory Ruling and Order*)).

[3] *See* Comments of National Consumer Law Center, *et al.* ("*NCLC Comments*"); Comment by John Herrick; Comments of Consumers Union; Comment of Burke Law Offices, LLC; Comments of Justin T. Holcombe; Comments of Consumer Action (*"Consumer Action Comments*").

[4] NCLC Comments at i-ii, 4-11; Consumer Action Comments at 1-2.

consumer protection statutes of the states.[5] The FTC is empowered to seek awards of up to $40,654.00 per violation for calls that constitute or promote unfair or deceptive acts or practices.[6] There is no reason to believe that Congress intended this Commission or private plaintiffs to supplement these robust remedies with lawsuits and enforcement actions based upon a strained reading of the Telephone Consumer Protection Act.

Congress also has addressed abusive debt collection practices in the Fair Debt Collection Practices Act (FDCPA).[7] Although businesses that make collection calls on their own account are not covered by the FDCPA, a number of state debt collection statutes do restrict calls by creditors; and the TCPA makes creditors' debt collection calls unlawful, without prior express consent, when they are placed to mobile devices using prerecorded or artificial voices.[8] Congress and the states can expand these remedies by legislative means whenever they think appropriate; the TCPA does not give the FCC a mandate to do so by ignoring the terms of the ATDS definition.

Finally, abusive telemarketing practices are squarely addressed by the TCPA, the Telemarketing Consumer Fraud and Abuse Prevention Act (enforced by the FTC), and the telemarketing statutes of the states.[9] The TCPA, specifically, restricts telemarketing calls to numbers on the national do-not-call registry, limits the times of day during which telemarketing calls may be made, requires businesses to maintain internal do-not-call lists, requires prior express consent to place artificial or prerecorded voice marketing calls to residences, and

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[5] *See* 15 U.S.C. § 45(a); 16 C.F.R. pt. 310.

[6] Federal Trade Commission, "Complying with the Telemarketing Sales Rule," https://www.ftc.gov/tips-advice/business-center/guidance/complying-telemarketing-sales-rule (visited June 26, 2018).

[7] 15 U.S.C. § 1692.

[8] *See, e.g.,* Cal. Civ. Code § 1788; 47 U.S.C. § 227(b)(1).

[9] *See* 15 U.S.C. §§ 6101-6108; Cal. Bus. & Prof. Code § 17952; N.Y. Gen. Bus. Law § 399.

restricts the use of random or sequential dialing, or artificial or prerecorded voices, for any call placed to a mobile device.[10] Continuing to misread the ATDS definition will add nothing to these protections and will, as discussed at length in TechFreedom's initial comments, discourage the implementation of calling technologies that benefit businesses and consumers alike.

2. <u>Baseless Class Actions are not the Solution</u>

NCLC and other commenters urge the Commission to read the ATDS definition expansively in order to sustain the rising tide of TCPA class-action suits.[11] This gets the rationale for private actions exactly backwards: the remedy is not an end in itself, but is a means of vindicating substantive rights under the TCPA *as written*. Reforming the FCC's misreading of the ATDS definition will not reduce the availability of the private right of action for actual violations of the TCPA; it will only continue to discourage the adoption of technologies that reduce costs and increase accuracy, but that continue to have an uncertain status under the FCC's existing guidance.

More fundamentally, the emphasis of some commenters on the supposed need to encourage class-action suits suggests a motivation other than promotion of consumer interests. As NCLC admits, "TCPA suits [in 2017] amounted to only six hundredths of a percent of the seven million complaints about robocalls that consumers filed with the FTC and the FCC."[12] Obviously, very few consumers benefit from this lucrative churn of litigation, and encouraging its spread is not a legitimate part of this Commission's public-interest mandate.

[10] 47 U.S.C. § 227; 47 C.F.R. § 64.1200.

[11] *See* NCLC Comments at 11-14.

[12] SNCLC Comment at ii.

3. The Commission Should Ignore Demands to Mandate Inefficient Dialing

TechFreedom's initial comments point out that the interpretation of the TCPA definition adopted in the Commission's *2015 TCPA Order,* including the confused "human intervention" test, has forced businesses to introduce deliberate inefficiencies into their dialing systems that only increase costs and the risk of misdialed calls.[13] NCLC perversely describes these same efforts, not as the onerous compliance measures they are, but as *evasions* of TCPA requirements.[14] NCLC urges the Commission to shut down these "evasions" by requiring callers to use systems that are even *less* efficient.[15] This demand reflects precisely the problem that is the principal focus of TechFreedom's comments: the more the Commission expands the ATDS definition beyond its terms, the more severely beneficial technological innovations are foreclosed. Now is the time for the Commission to ignore these demands and correct the ill-advised guidance that encourages them.

CONCLUSION

TechFreedom welcomes the opportunity to participate in this proceeding, and hopes that its pro-technology and pro-market perspective will be helpful to the Commission in reforming

[13] Comments of TechFreedom in CG Dockets Nos. 18-152 and 02-278 (filed Jun. 13, 2018), pp. 5-7.

[14] NCLC Comments at 25-26.

[15] *Id.*

the interpretation and enforcement of the TCPA. It urges the Commission to adopt the consensus opinion that Congress intended a limited definition of ATDS as clarified by *ACA* Court.

Respectfully submitted,

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